

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 85 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

SAVITABEN GOVINDBHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 85 of 2004
MR ABHAYKUMAR P SHAH with MR.S.V RAJU for Petitioner
NOS.1 TO 7.
MS NANDINI JOSHI, LD. A.P.P. for Respondent.

CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 17/06/2004

C.A.V. JUDGMENT

The present Revision Application has been preferred, against the issuance of notification under Section 82 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code') by the learned Metropolitan Magistrate, Court No.5, Meghaninagar, Ahmedabad; directing all the petitioners (orig. accused)

of the Criminal Case i.e. M-Case No.2/03, pending under investigation with the Karanj Police Station of Ahmedabad City, to appear before the said Court; invoking jurisdiction of this Court under Section 401 r/w. Sections 397 and 482 of the Code.

2. The learned counsel Mr.S.V. Raju, appearing on behalf of Mr.A.P.Shah, learned counsel for the petitioners-accused, has pointed out the basic infirmities in the notification; that the petitioners are not given 30 exclusive days to surrender and that by itself makes the notification ineffective and invalid and, therefore, no proceedings under Section 82 of the Code can be initiated. According to petitioners, the notification under challenge has been issued pursuant to one application dated 16th January, 2004 given by the Investigating Officer i.e. the Police Sub-Inspector, Pattharkuva Chowky, Ahmedabad. According to the petitioners, the said application has been given by the said Police Sub-Inspector with an ulterior motive, though the petitioners are not absconding. At this stage, it would be beneficial to reproduce the relevant Sections 82 and 83 of the Code :

"82. Proclamation for person absconding :- (1)

If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :

(i) (a) it shall be publicly read in some conspicuous part of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct

a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

- (3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause (i) of subsection (2) shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

"83. Attachment of property of person absconding.-(1) The Court issuing a proclamation under Sec.82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person :

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise, that the person in relation to whom the proclamation is to be issued,-

- (a) is about to dispose of the whole or any part of the property, or
- (b) is about to remove the whole or any part of his property from the local jurisdiction of the court.

it may order the attachment simultaneously with the issue of the proclamation.

- (2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made; and it shall authorise the attachment of any property belonging to such person without such district (when endorsed by the District Magistrate within whose district) such property is situated.
- (3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting
the delivery of such property to the
proclaimed person or to any one on his
behalf; or

(d) by all or any two of such methods, as
the Court thinks fit.

(4) If the property ordered to be attached is
immovable, the attachment under this section
shall, in the case of land paying revenue to the
State Government, be made through the Collector
of the District in which the land is situated,
and in all other cases-

(a) by taking possession; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting
the payment of rent on delivery of
property to the proclaimed person or to
any one on his behalf; or

(d) by all or any two of such methods, as
the Court thinks fit.

(5) If the property ordered to be attached
consists of live-stock or is of a perishable
nature, the Court may, if it thinks it expedient,
order immediate sale thereof, and in such case
the proceeds of the sale shall abide the order of
the Court.

(6) The powers, duties and liabilities of a
receiver appointed under this section shall be
the same as those of a receiver appointed under
the Code of Civil Procedure, 1908 (5 of 1908)."

3. It is argued that the scheme provided by Section
82 of the Code denotes a mandate, if Section 82 of the
Code is analyzed, it is necessary that : (i) the Court
should have reason to believe that the person, against
whom a warrant has been issued by it, has absconded and
(ii) after recording such satisfaction, the Court should
require the concerned person to appear at a specified
place and a specified time, not less than 30 days from

the date of publication of the proclamation. The emphasis given by Mr.Raju is that on bare reading of the notification under challenge, it is very clear that the time specified is not of clear 30 days and, therefore, the same is in violation of mandatory provision of subsection (1) of Section 82 of the Code. Though the application contains other grounds, they are not seriously pressed by Mr.Raju including the ground that the said notification was not affixed on the conspicuous part of the Court-house.

4. In support of this submission, Mr.Raju has placed reliance on the decision reported in AIR 1936 PC 253 (2) and other subsequent decisions, wherein it is observed that " it is settled law that where a power is given to do certain things in a certain way, the things must be done that way or not at all. Other method of performance are necessarily forbidden." So according to Mr.Raju in the notification under challenge, the petitioners-accused were asked to surrender or to respond to the notification, "within 30 days". So it was not a notice of clear 30 days and hence, it should be held that the same is issued without application of mind and signed by the learned Metropolitan Magistrate mechanically.

5. Section 83 of the Code provides for attachment of the property of the person absconding. The Court issuing proclamation under Section 82 of the Code may, for the reasons to be recorded in writing, at any time after issuing the proclamation, order attachment of any property movable or immovable, or both of the proclaimed person. So the immediate next step that the learned Metropolitan Magistrate could have taken was to initiate proceedings for attachment of the properties of the persons named in the notification i.e. the petitioners-accused. So the appearance of the petitioners before the learned Magistrate could be for the proceedings contemplated under Section 83 of the Code. Therefore, if the notification is found invalid, there is no scope or reason for the petitioners-accused to surrender before the Court. The learned Magistrate can issue a fresh notification if he is satisfied that he has reason to believe that the petitioners or any of them is an absconder. According to Mr.Raju, the petitioners had approached the competent Court by way of filing an Anticipatory Bail Application, so technically it can be said that they were before the competent Court through their advocate and it cannot be said that they are absconders.

6. One argument, which has legal force, advanced by

Mr.Raju is that the notification under challenge does not give clear "30 days" contemplated under subsection (1) of Section 82 of the Code. The language itself indicates that the provision is mandatory and in more than one decision, it has been held that this provision is mandatory and if the notification directs the accused to appear before the Court in less than 30 days, such notification is not sustainable. So on this sole count, the notification under challenge can be quashed and should be quashed.

7. The say of Ms. Nandini Joshi, learned Additional Public Prosecutor, is that the very decision which has been referred to by Mr.Raju, reported in 2002 Cr.L.J. 1284, in a way helps the prosecuting agency wherein the Delhi High Court has held that issuance of proclamation against the petitioners and the order declaring the petitioners as proclaimed offenders is bad and the same requires to be quashed and set aside. But simultaneously, the Delhi High Court directed the petitioners to appear before the trial Court on a given date and time; and the trial Court was further directed to proceed in accordance with law. According to Ms. Joshi, this Court should also, while quashing the notification suffering from a technical infirmity, direct the petitioners-accused to appear before the concerned Metropolitan Magistrate on a given date and time.

8. I have carefully gone through the decision of the Delhi High Court and this Court is in agreement to the submission made by Ms. Nandini Joshi. It would be incorrect to say that there could not be other proceedings other than the proceedings contemplated under Section 83 of the Code, after service of process issued under Section 82 of the Code. In the case before the Delhi High Court, it was specifically established that the petitioners-accused are not traceable and the non-bailable warrants against the petitioners could not be served, so by giving 30 days clear time, the Court directed the accused to appear before the concerned Magistrate and the trial Court was further directed to continue further proceedings in the trial in accordance with law. The say of Ms. Joshi based on the observation made by the Apex Court in the judgment reported in 2000 (10) SCC 438 in the case of State through C.B.I. v/s. Dawood Ibrahim Kaskar and ors., is found not only logical but it has some legal force because the learned Magistrate was otherwise authorized to issue a warrant under Section 73 of the Code during the investigation also. When such power could have been exercised by him for appearance of the petitioners-accused before the

Court only and not before the Police in aid to the investigation, this Court can positively direct the accused to appear before the concerned Magistrate on a given date and time. Thereafter, appropriate further orders including to hand over the petitioners-accused to the Investigating Officer can be passed, of course after affording sufficient opportunity of being heard to the petitioners. Merely because the case has been sent for the Police Investigation under Section 156(3) of the Code, it cannot be said that there is nothing pending in the Court of learned Metropolitan Magistrate. On the contrary, in the present case as the complaint has been filed in the Court of learned Metropolitan Magistrate and the same has been sent to the Police for investigation and for submitting the report and the outcome of the investigation, it can be legally said that a complaint before the trial Court was very well under the domain of the Court and the Investigating Agency namely the Police is always under legal obligation to submit its report after completion of the process of investigation. So the say of Mr.Raju is not found acceptable that if this Court is of the view that the notification is bad in law, the petitioners-accused cannot be subjected to any other type of order and that too in the nature of direction to surrender or appear before the concerned Court.

9. Filing of an Anticipatory Bail Application by the petitioners-accused through their advocate cannot be said to be an appearance of the petitioners-accused in a competent Court, so far as proceeding initiated under Section 82/83 of the Code is concerned; otherwise each absconding accused would try to create shelter by filing an Anticipatory Bail Application to avoid obligation to appear before the court and raises the proceeding under Section 83 of the Code claiming that he cannot be termed as an absconder in the eye of law. Physical appearance before the Court is most important, if relevant scheme of Sections 82 and 83, is read closely.

10. In the result, the Revision Application is allowed. The notification dated 27th January, 2004 issued by the learned Metropolitan Magistrate, Court No.5, Meghaninagar, Ahmedabad, is hereby quashed and set aside. However, the petitioners-accused are directed to appear in person before the learned Metropolitan Magistrate, Court No.5, Meghaninagar, Ahmedabad, on or before 28th June, 2004. Rule is made absolute in above terms.

11. It is true that in the case before the Delhi High Court, the Court was requested to exercise inherent

powers vested with the Court under Section 482 of the Code and this Court is exercising revisional jurisdiction vested with it in scrutinising the legality and validity of the notification. But that by itself would not bar this Court in issuing direction to the petitioners -accused to act in accordance with the direction given by the Court.

(C.K. Buch,J)

Aakar

FURTHER ORDER

After the pronouncement of the judgment, Mr. A.P. Shah, learned counsel appearing for the petitioner-accused, made a request to stay the operation, implementation and execution of the judgment for eight weeks because they want to challenge this judgment before the higher forum. The request is not found acceptable and hence, the same is rejected.

Date :17.06.2004 (C.K. Buch, J)

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